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A BRIEF SURVEY OF EQUITY JURISDICTION.

EQUITY jurisdiction is a branch of the law of remedies; and as it affects, or is affected by, nearly the whole of that law, it is impossible to obtain an intelligent view of it as a whole without first taking a brief view of the law of remedies as a whole. Moreover, as all remedies are founded upon rights, and have for their objects the enforcement and protection of rights, it is impossible to obtain an intelligent view of remedies as a whole, without first considering the rights upon which they are founded.

Rights are either absolute or relative. Absolute rights are such as do not imply any correlative duties. Relative rights are such as do imply correlative duties.

Absolute rights are of two kinds or classes: First, those rights of property which constitute ownership or dominion, as distinguished from rights in the property of another,—*jura in re aliena;* secondly, personal rights; *i.e.*, those rights which belong to every person as such.

Relative rights, as well as their correlative duties, are called obligations; *i.e.*, we have but one word for both the right and its correlative duty. The creation of every obligation, therefore, is the creation of both a right and a duty, the right being vested in the obligee, and the duty being imposed upon the obligor. Undoubtedly the word "obligation" properly expresses the duty,

and the use of the same word to express the right is a defect of nomenclature which is unfortunate, as it has given rise to much confusion of ideas.

Obligations are either personal or real, according as the duty is imposed upon a person or a thing. An obligation may be imposed upon a person either by his own act, namely, by a contract, or by act of law.[1]

An obligation may be imposed upon a thing either by the will of its owner, manifested by such act or acts as the particular system of law requires, or by act of law. It is in such obligations that those rights of property originate which are called rights in the property of another,—*jura in re aliena.* Instances of real obligations will be found in servitudes or easements, in which the law regards the servient tenement as owing the service; also in the Roman *pignus* and *hypotheca*, in which the *res*, pignorated or hypothecated to secure the payment of a debt, was regarded as a surety for the debt. The *pignus* has been adopted into our law under the name of *pawn* or *pledge.* The *hypotheca* has been rejected by our common law,[2] though it has been adopted by the admiralty law. A lien is another instance of a real obligation in our law, the very words "lien" and "obligation," having the same meaning and the same derivation. A familiar instance of a real obligation created by law will be found in the lien of a judgment or recognizance.[3]

[1] Strictly, every obligation is created by the law. When it is said that a contract creates an obligation, it is only meant that the law annexes an obligation to every contract. A contract may be well enough defined as an agreement to which the law annexes an obligation.

Strictly, also, a tort gives rise to an obligation as much as a contract; namely, an obligation to repair the tort or to make satisfaction for it; but this is an obligation which the law imposes upon a tort-feasor merely by way of giving a remedy for the tort. In the same way the breach of a contract gives rise to a new obligation to repair or make satisfaction for the breach.

[2] It would, however, be more correct to say that our law does not permit the owner of property to hypothecate it at his own will and pleasure; for hypothecations created by law do exist with us, as will presently be seen.

[3] Such a lien is an hypothecation created by law. It is what civilians call a general hypothecation, because it attaches to all the land of the judgment debtor or recognizor, whether then owned by him or afterwards acquired.

Instances of hypothecations of goods created by law will be found in the lien given to a landlord on the goods of his tenant to secure the payment of rent, and in the lien on beasts *damage feasant*, given to the person injured to secure satisfaction for the injury done. These liens are enforced by distress. The former is in a sense general; *i.e.*, it attaches on all the goods which are on the demised premises when the rent becomes due.

Relative rights differ from absolute rights in this, that the former add nothing to the sum or aggregate of human rights; for what an obligation confers upon the obligee is precisely commensurate with what it takes from the obligor. Absolute rights, therefore, make up the entire sum of human rights.

Every violation of a right is either a tort or a breach of obligation. Every violation of an absolute right is, therefore, a tort. So is every violation of a right arising from an obligation (*i.e.*, of a relative right) which does not consist of a breach of the obligation. Hence every act committed by any person in violation of a right created by a real obligation is a tort; for such an act cannot be a breach of the obligation.

Whether a right created by a personal obligation can be violated by an act which constitutes a tort, *i.e.*, by an act which does not consist of a breach of the obligation, is a question involved in much doubt and difficulty. In Lumley *v.* Gye,[1] and in Bowen *v.* Hall,[2] this question was decided broadly in the affirmative; for it was held in each of those cases that it was a tort maliciously to procure an obligor to break his obligation. In each of them, however, the Court was divided; in Lumley *v.* Gye there was a very powerful dissenting opinion, which was fully adopted by one of the judges in Bowen *v.* Hall; and, though the writer is not at present prepared to say that the decisions were wrong, yet neither is he prepared to admit that they were right.[3]

An obligation may, however, be so framed as to make it possible for the obligor or a third person to destroy the obligation before the time for its performance arrives. For example, if the performance of an obligation be made conditional upon the happening of an event which is subject to human control, any act which prevents the happening of that event will destroy the obligation; and there can be no doubt that such an act, if done for the purpose of destroying the obligation, will constitute a

[1] 2 El. & Bl. 216. [2] 6 Q. B. D. 333.

[3] "N. B. Any prevention of the completion of an obligation (*stricto sensu*) caused by a third party would be no violation of a right in the *obligee*, or, if it would, would be a violation of a distinct right. A stranger who employs a builder to undertake an extensive work, or wounds or maims him (thereby, in either case, preventing him from completing a previous contract with myself) violates no right in *me;* and my remedy is against the *builder* for the breach of contract with myself. A stranger who inveigles my servant violates, not my *jus ad rem* under the contract, but my *jus in re*. The servant himself, indeed, does; and for this breach of his obligation (*stricto sensu*) I may sue him on the contract." — *Austin, Jurisprudence* (4th ed.), Vol. 1, p. 402, note

tort. Nor does the writer see any reason to doubt that it would also be a tort maliciously to procure another person to destroy an obligation, even though the person committing the act of destruction were the obligor.[1]

For most practical purposes, however, it may be said with sufficient correctness that a right created by a personal obligation is subject to violation only by a breach of the obligation, and hence only by the obligor; for it will very seldom happen that any question will arise as to the violation of such a right by any person other than the obligor, or in any way other than by a breach of the obligation.

What has thus far been said of rights and their violation has in it no element of equity. The rights which have been described may be defined as original and independent rights, and equity has no voice either in the creation of such rights or in deciding in whom they are vested. Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a *res*, which by law has no owner, is a subject of ownership, nor that a *res* belongs to A which by law belongs to B; nor can it impose upon a person or a thing an obligation which by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law.

If there is no element of equity in a right, neither is there in the violation of that right; for what is a violation of a right depends entirely upon the extent of the right. If, therefore, equity could declare that a right has been violated when by law it has not, it could thus enlarge the right of one man and curtail that of another.

When, however, it is said that equity has no voice in a given question, it must not be inferred that a judge sitting in equity has no such voice. An equity judge administers the same system of law that a common-law judge does; and he is therefore constantly called upon to decide legal questions. It, therefore, sometimes happens that courts of equity and courts of common law declare the law differently; and a consequence of this may be that courts of equity will recognize a certain right which courts of common

[1] See the observations of Professor Ames, *supra*, page 10.

law refuse to recognize; but it does not follow that the right thus recognized is properly an equitable right. So courts of equity may treat an act as a violation of a legal right, which courts of common law treat as rightful; but it does not follow that such an act is properly an equitable tort. A well-known instance of such an act is found in what is commonly called equitable waste. For example, if a tenant for life, without impeachment of waste, cut down ornamental trees, or pull down houses, a court of equity says he has committed waste, while a court of common law says he has not. Either court *may* be wrong, and one of them *must* be; for the question depends entirely upon the legal effect to be given to the words "without impeachment of waste," and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of view is, that there is a remedy in equity against the tenant in the case supposed, while there is none at law; and this gives to the act of the tenant the semblance of being an equitable tort. In truth, however, the act is a legal tort, if the view taken by courts of equity is correct, while it is a rightful act, if the view taken by courts of common law is correct.

There are, however, true equitable rights, and also true equitable wrongs, the latter being violations of equitable rights. A true equitable right is always derivative and dependent, *i.e.*, it is derived from, and dependent upon, a legal right. A true equitable right exists when a legal right is held by its owner for the benefit of another person, either wholly or in part. Such a right may be defined as an equitable personal obligation. It is an obligation because it is not ownership;[1] and because it is relative, *i.e.*, it cannot exist without a correlative duty; and it is personal because the duty is imposed upon the person of the owner of the *res* (*i.e.*, of the legal right), and not upon the *res* itself. And yet courts of equity frequently act as if such rights were real obligations, and even as if they were ownership. Indeed, it may be said that they always so act when they can thereby render the equitable right more secure and valuable, and yet act consistently with the fact

[1] That is, it is not ownership of the thing which is the subject of the obligation. For example, when land is held by one person for the benefit of another, the latter is not properly owner of the land even in equity. Of course the equitable obligation itself is as much the subject of ownership as is a legal obligation; and the only reason why such ownership is not recognized by courts of common law is that the thing itself which is the subject of the ownership (*i.e.*, the equitable obligation), is not recognized by them.

that such right is in truth only a personal obligation. For example, a personal obligation can be enforced only against the obligor and his representatives; but an equitable obligation will follow the *res* which is the subject of the obligation, and be enforced against any person into whose hands the *res* may come, until it reaches a purchaser for value and without notice. In other words, equity imposes the obligation, not only upon the person who owned the *res* when the obligation arose, but upon all persons into whose hands it afterward comes, subject to the qualification just stated. But the moment it reaches a purchaser for value and without notice, equity stops short; for otherwise it would convert the personal obligation into a real obligation, or into ownership. Why is it, then, that equity admits as an absolute limitation upon its jurisdiction a principle or rule which it yet seems always to be struggling against, namely, that equity acts only against the person,— *æquitas agit in personam?* One reason is (as has already appeared) that equity has no choice or option as to admitting this limitation upon its jurisdiction. Another reason is that if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice; a result which would not only be intolerable to those for whose benefit equity exists, but would be especially abhorrent to equity itself. Upon the whole, it may be said that equity could not create rights *in rem*[1] if it would, and that it would not if it could.

The Roman *pignus* and *hypotheca* were rights *in rem*. The *pignus* was admitted into our law because it affected chattels only, and because it could not be effected without delivery of possession; but the *hypotheca* was rejected because it affected

[1] Here again, when it is said that equity cannot create rights *in rem*, reference is had to the *res*, which is the subject of the equitable obligation. Regarding the equitable obligation itself as the *res*, there can be no doubt that an equitable obligation, like a legal obligation, always creates a right *in rem* (*i.e.*, an absolute right), as between the obligee and all the rest of the world except the obligor; for it can create a right *in personam* (*i.e.*, a relative right) only as between the obligee and the obligor. To say, therefore, that an obligation can create a relative right *only*, is to say that it can create no right whatever, except as between the obligee and the obligor. Moreover, if an obligation does not create an absolute right, it is impossible to support Lumley *v.* Gye and Bowen *v.* Hall, though the converse does not necessarily follow.

As an equitable obligation creates a right which (in one of its aspects) is absolute, of course it follows that such a right may be the subject of a purchase and sale, or of a new equitable obligation. If, then, the owner of such a right first incur an obligation to hold it for the benefit of A, and afterward sell it to B, who has no notice of the previous obligation to A, will B be bound by the obligation to A? Prof. Ames has clearly

land, and did not require any change of possession.[1] Equity introduced the *hypotheca* without any violation of law, and with the most beneficial effects. Why? Because equity introduced it as a right *in personam* only.

Legal personal obligations may be created without limitation, either in respect to the persons between whom, or the purposes for which, they are created, provided the latter be not illegal. But it is otherwise with equitable obligations; for, as they must be founded originally upon legal rights, so they can be imposed originally only upon persons in whom legal rights are vested, and only in respect of such legal rights; *i.e.*, only for the purpose of imposing upon the obligors in favor of the obligees some duty in respect to such legal rights. But the original creation of equitable obligations is subject to still further limitations, for it is not all legal rights that can be the subjects of equitable obligations. Only those can be so which are alienable in their nature. Of absolute rights, therefore, none of those which are personal can ever be the subjects of equitable obligations, while nearly all rights which consist in ownership can be the subjects of such obligations. Relative rights can generally be the subjects of equitable obligations, but not always. For example, some rights arising from real obligations, are inseparably annexed to the ownership of certain land, and, therefore, are not alienable by themselves. So, also, some rights arising from personal obligations are so purely personal to the obligee as to be obviously inalienable. It is only necessary to mention, as an extreme case, the right arising from a promise to marry.

What has thus far been said applies to equitable rights as originally created, *i.e.*, to equitable rights which are derived immediately from legal rights; but there are equitable rights which are derived from legal rights only mediately. For, when an

shown, as the writer thinks, that he will not. (See *supra*, pp. 9-11.) To hold otherwise would be to hold that equity will not afford the same protection to property of its own creation that it does to property not of its own creation; which would be not only absurd in itself, but contrary to the principle that equitable property is governed by the same rules as legal property.

If Prof. Ames's doctrine is correct, it proves the statement in the text, namely, that equity will not create a true, real obligation (*i.e.*, one which will follow the *res* into the hands of a purchaser for value and without notice), even when it has the power to do so; for of course, as between conflicting rights of its own creation, equity may do whatever justice is supposed to require.

[1] See *supra*, page 56, note 3.

equitable right has once been created it may in its turn become the subject of a new equitable right, *i.e.*, its owner may incur an equitable obligation to hold his equitable right for the benefit of some other person; and this process may go on *ad infinitum*, each new equitable right becoming in its turn the subject of still another equitable right, and all the equitable rights being derived from the same legal right, the first immediately, the others mediately. It is to be observed that these equitable rights are created without any alienation or diminution of the rights from which they are derived. For it is not the nature of an obligation, real or personal, legal or equitable, while it remains an obligation merely (that is, while it remains unperformed) to alienate or diminish in any way any right vested in the obligor. In the case, therefore, of a succession of equitable rights derived from one legal right, the legal right remains undiminished in its original owner, and so does each equitable right, and yet the equitable rights add nothing to the sum of human rights,[1] the aggregate of the legal right and all the equitable rights only equalling the legal right. So if the legal right be destroyed (*e.g.*, by the act of God), all the equitable rights will fall to the ground. It is to be further observed that the legal owner is bound only to the original equitable owner, and the latter to the second equitable owner, and so on. If the legal owner and the equitable owners be conceived of as standing in a line, one behind the other, in the reverse order of the time of the creation of their rights, it will be seen that each one in the line is equitably bound to the one immediately before him, and to no one else, and hence that there are as many equitable bonds as there are persons in the line, less one, — the one standing in front being, of course, subject to no bond.

The foregoing method of deriving an indefinite succession of equitable rights from one legal right may be termed the method by sub-obligation.

Another method is for the first equitable obligee to assign his equitable right, at the same time receiving from the assignee a new equitable obligation. He may then assign his new equitable right to a new assignee, at the same time receiving from the latter still another equitable obligation; and this operation may be repeated indefinitely. This method takes place in the common case where

[1] See *supra*, page 57.

land is mortgaged in the ordinary way to several persons in succession; for in that case each successive mortgage has a twofold operation, namely, that of an assignment or transfer to the mortgagee, and that of imposing an equitable obligation on the mortgagee in favor of the mortgagor. For example, the first mortgage has the twofold operation of assigning or transferring the land to the mortgagee, and of creating an equitable obligation in the latter to reconvey the land to the mortgagor on payment of the mortgage debt; and in this way the first or original equitable right is created. Then a second mortgage has the twofold operation of assigning this original equitable right, and of creating in the assignee an equitable obligation to reassign it to the mortgagor on payment of the second mortgage debt. In this way a second equitable right is created, which in its turn may be assigned by a third mortgage, the third mortgagee incurring an equitable obligation to reassign it to the mortgagor on payment of the third mortgage debt; and this operation will be repeated as often as a new mortgage is given.

If, upon the making of the first mortgage, the mortgagor and the first mortgagee be conceived of as standing one behind the other, the effect of a second mortgage will be to place the second mortgagee between the mortgagor and the first mortgagee, and thus to separate the two latter; for the second mortgagee, as assignee of the mortgagor, steps into the shoes of the latter as to the first mortgagee, becoming in effect the mortgagor as to the latter, just as if he had purchased the equitable right of the mortgagor (*i.e.*, his equity of redemption), absolutely. As the mortgagor thus ceases to have any relations, for the time being, with the first mortgagee, of course he must give up his place to his successor, the second mortgagee. Still the mortgagor does not stand aside as a mere stranger, as he would do if he had simply sold his equity of redemption; but he takes his place next to the second mortgagee by virtue of the new equitable obligation (*i.e.*, equity of redemption) running from the latter to him. For the same reasons a third mortgagee will take his place between the mortgagor and the second mortgagee, and so on. Therefore, the mortgagor will always be at one end of the line, and the first mortgagee at the other end, the latter always remaining stationary, but the former moving, as often as a new mortgage is given, to make room for the new mortgagee.

A question, however, still remains, namely, is the first mortgagee to be placed in front, with the several other mortgagees, and the mortgagor behind him in the order of time, or is the mortgagor to be placed in front with the several mortgagees behind him in the reverse order of time? The answer depends upon whether the mortgagees and the mortgagor are to be placed with reference to the operations of the mortgages as transfers or assignments, or with reference to their operation as creating equitable obligations. If the former, the first mortgagee should stand in front; if the latter, the mortgagor should stand in front. And, as we are now considering mortgages, with reference to their operation in creating equitable obligations, it is clear that the mortgagor and the mortgagees should be placed with reference to that operation. Thus, we have the same final result, whether a succession of equitable obligations be created by successive mortgages, or by successive sub-obligations, though this result is produced by different machinery. In both cases there are as many equitable obligations as there are persons in the line, less one. In both cases every person in the line, except the first and the last, is both an equitable obligor and an equitable obligee, the first being an equitable obligee only, and the last an equitable obligor only. The only differences are, first, that, in the case of successive mortgages, each successive equitable obligation is made the subject of a new equitable obligation (*i.e.*, of a sub-obligation), not by the original obligee, but by his assignee; and, secondly, that all the successive equitable obligations are made in favor of the same person, namely, the mortgagor, the latter always acquiring a new equitable obligation the moment that he relinquishes an old one.

There are still other modes in which an indefinite number of equitable rights may be derived from one legal right, namely: first, the owner of the legal right, instead of incurring one equitable obligation as to the whole of the legal right, may incur an indefinite number of equitable obligations, each as to some aliquot part of the legal right; secondly, the owner of the original equitable right may assign that right to an indefinite number of persons by assigning some aliquot part of it to each.

With respect to the modes in which they are created, equitable obligations differ widely from legal obligations. Most legal obligations are created by means of contracts; *i.e.*, a person promises (expressly or by implication), or covenants to do or not to do

something, and the law annexes to the promise or covenant an obligation to do, or refrain from doing, according to the terms of the promise or covenant. But a purely equitable obligation cannot be made in that way. I say "a purely equitable obligation," because an obligation is frequently annexed to a promise or covenant both by law and by equity, *i. e.*, the law annexes a legal obligation, and equity annexes an equitable obligation. But equity cannot annex an obligation to a promise or covenant to which the law refuses to annex any obligation.[1] In a word, there is properly no such thing as an equitable promise or covenant, and no such thing as an equitable contract. The reason, therefore, why a contract cannot result in creating a purely equitable obligation is, that a contract always results in creating a legal obligation.

How, then, are purely equitable obligations created? For the most part, either by the acts of third persons or by equity alone. But how can one person impose an obligation upon another. By giving property to the latter on the terms of his assuming an obligation in respect to it. At law there are only two means by which the object of the donor could be at all accomplished, consistently with the entire ownership of the property passing to the donee, namely: first, by imposing a real obligation upon the property; secondly, by subjecting the title of the donee to a condition subsequent. The first of these the law does not permit; the second is entirely inadequate. Equity, however, can secure most of the objects of the donor, and yet avoid the mischiefs of real obligations, by imposing upon the donee (and upon all persons to whom the property shall afterwards come without value or with notice) a personal obligation with respect to the property; and accordingly this is what equity does. It is in this way that all trusts are created, and all equitable charges made (*i. e.*, equitable hypothecations or liens created) by testators in their wills. In this way, also, most trusts are created by acts *inter vivos*, except in those cases in which the trustee incurs a legal as well as an equitable obligation. In short, as property is the subject of every equitable obligation, so the owner of property is the only person whose act or acts can be the means of creating an obligation in respect to that property. Moreover, the owner of property can

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[1] See *supra*, page 58.

create an obligation in respect to it in only two ways: first, by incurring the obligation himself, in which case he commonly also incurs a legal obligation; secondly, by imposing the obligation upon some third person; and this he does in the way just explained.

But suppose a person, to whom property is given on the terms of his incurring an equitable obligation in respect to it, is unwilling to incur such obligation, shall it be imposed upon him against his will? Certainly not, if he employs the proper means for preventing it; but the only sure means of preventing it is by refusing to accept the property, *i. e.*, to become the owner of it; for no person can be compelled to become the owner of property even by way of gift. If he once accept the property, the equitable obligation necessarily arises, and he can get rid of the latter only by procuring some one else to accept the property with the obligation; and even this he cannot do without the sanction of a court of equity.

An owner of property may, however, incur an equitable obligation in respect to it, founded upon his own act and intention, and yet make no contract, nor incur any legal obligation. For example, if an owner of property do an act with the intention of transferring the property, but which fails to accomplish its object because some other act is omitted to be done which the law makes necessary, equity will give effect to the intention by imposing an equitable obligation to do the further act which is necessary to effect the transfer, provided a valuable consideration was paid for the act already done, so that the transfer, when made, will be a transfer for value, and not a voluntary transfer. So, if an owner of property, thinking that he has the power to hypothecate it merely by declaring his will to that effect, declare, for a valuable consideration, that such property shall be a security to a creditor for the payment of his debt, though he will not create a legal hypothecation, nor incur any legal obligation, yet he will create an equitable hypothecation or an equitable lien; *i. e.*, equity will give effect to the intention by creating an equitable obligation to hold the property as if it were legally bound for the payment of the debt. In both the cases just put, equity proceeds upon the principle that the act already done would be effective for the accomplishment of its object in the absence of any positive rule of law to the contrary; and in both cases equity gives effect to the inten-

tion without any violation of law; for, in the first case, equity compels a performance of every act which the law requires, while, in the second case, equity merely creates a personal obligation which violates no law, in lieu of a real obligation, which the law refuses to create.

Many equitable obligations are created and imposed by equity alone; and this is done upon the principle that justice can thereby be best promoted. For example, it is by force of equity alone that an equitable obligation follows the property which is the subject of the obligation until such property reaches a purchaser for value and without notice. The obligation may have been created originally through the act or acts of the owner of the property; but it is by force of equity alone that this obligation is imposed upon subsequent owners of the property who had no part in its original creation. So also all that large class of equitable obligations commonly known as constructive trusts are created by equity alone. For example, where property is obtained by fraud, unless (as seldom happens) the fraud be of such a nature as to prevent the legal title from passing, the only legal remedy will be an action for damages against the party committing the fraud; but equity, by creating an equitable obligation, can and will follow the property itself (until it comes into the hands of a purchaser for value and without notice), and compel a specific restoration of it. If it be asked why a legal obligation to restore the property is not created, and how equity can go beyond the law, the answer is that the right is created in such a case merely for the sake of the remedy, and that the common law never contemplates any remedies other than those which the common law itself affords. The common law does not, therefore, create an obligation to restore the property, because it would regard such an obligation as useless. It could only give damages for a breach of the obligation; and it can equally well give damages for the fraud itself. Moreover, the equitable obligation is generally conditional upon the restoration by the person defrauded of the consideration received by him, and courts of common law have no adequate machinery for dealing with conditions of such a nature.

Another large class of equitable obligations created by equity alone are those (already referred to) imposed upon mortgagees in favor of mortgagors. A mortgage is a transfer of property, either defeasible by a condition subsequent, namely, by the payment of

the mortgage debt on a day named, or accompanied by an agreement to reconvey the property upon a condition precedent, namely, the payment of the mortgage debt on a day named. In either case, if the mortgagor suffer the day to pass without performing the condition, his right to have the property restored to him is entirely and absolutely gone at law; and it is at the very moment that the mortgagor loses his legal right that his equitable right arises, namely, to have the property reconveyed to him (notwithstanding his failure to perform the condition agreed upon), on payment of the mortgage debt, interest, and costs. But how is it that equity can create such an obligation, it being not only without any warrant in law, but directly against the express agreement of the parties? Because, while the mortgagor has lost his right to the land, the mortgage debt remains wholly unpaid; and consequently the mortgagee can at law keep the land, and yet compel the mortgagor to pay the mortgage debt. In a word, the mortgagor loses (*i.e.*, forfeits) his land merely by way of penalty for not performing the condition; and though this is by the express agreement of the parties, yet equity says the only legitimate object of the penalty was to secure performance of the condition; and, therefore, it is unconscionable for the mortgagee to enforce the penalty, provided he can be fully indemnified for the breach of the condition; and, the condition being merely for the payment of money, the mortgagee will, in legal contemplation, be fully indemnified for its breach by the payment of the mortgage debt (though after the day agreed upon) with interest and costs. In short, equity creates the equitable obligation in question upon the ancient and acknowledged principle of relieving against penalties and forfeitures.

Still another important class of equitable obligations created by equity alone are those commonly known as rights of subrogation. For example, a debtor becomes personally bound to his creditor for the payment of the debt, and also pledges his property to the creditor for the same purpose. A third person also becomes personally bound to the creditor for the payment of the same debt as surety for the debtor, and pledges *his* property to the creditor for the same purpose. In this state of things justice clearly requires that the debt be thrown upon the debtor, or upon the pledge belonging to him, and that the surety and the pledge belonging to him be exonerated from the debt, provided this can

be done without interfering with the rights of the creditor. The latter, however, has the right to enforce payment of his debt in whatever way he thinks easiest and best, *i. e.*, in whatever way he chooses; and equity cannot prevent the exercise of that right without a violation of law. If, then, the surety or his property should be compelled to pay the debt, the legal consequences would be, first, that the debt would be gone, and the debtor's personal obligation to the creditor extinguished, for payment by the surety or by his property has the same legal effect as payment by the debtor or by his property; secondly, that, the *personal* obligation of the debtor being extinguished, the *real* obligation of his property would be extinguished also, for the latter is only accessory to the former, and hence it cannot exist without it. Moreover, other legal consequences to the surety would be, first, that the surety would lose the benefit of any legal priority that the creditor might have had over other creditors of the same debtor; secondly, that the surety would have no means of obtaining indemnity from the debtor unless he could prove a contract by the latter (either express or implied in fact) to indemnify him. But here equity employs a useful fiction in aid of the surety; for it treats the latter as having (not paid, but) purchased the debt. Hence, it treats the debt as still subsisting in equity until it is paid by the debtor or by his property. In other words, payment by the surety or by his property does not extinguish any of the rights of the creditor in equity, though it does at law; and yet, after payment by the surety or by his property, the creditor holds his rights, not for his own benefit, but for the benefit of the surety. This, therefore, is an instance in which equity creates one equitable right (namely, in the creditor), in order to make it the subject of another equitable right (namely, in favor of the surety).

There are other cases in which the object of subrogation is to obtain not exoneration, but contribution, namely, where there are several persons who ought in justice to contribute equally towards the discharge of a debt or other burden. Such is the case when there are several co-sureties for an insolvent debtor, or when several persons incur a debt jointly.

There is a class of cases in which the doctrine of subrogation seems to have been unwarrantably extended under the name of marshalling. For example, if the owner of houses A and B

(worth, respectively, $10,000 and $5,000) mortgage them both to C for $5,000, and then mortgage A to D for $10,000, and then become insolvent, it is said that D may throw the whole of C's mortgage on B, and thus obtain payment in full of his own mortgage out of A, though the consequence be that unsecured creditors of the insolvent will receive nothing; and the principle upon which this is held is generalized by saying that when one of two creditors has the security of two funds, and the other has the security of only one of those funds, the latter creditor may throw the debt of the former creditor wholly upon the fund which is not common to both (provided, of course, that fund be sufficient to pay it), in order that he may obtain payment of his own debt out of the fund which is common to both. This doctrine had its origin in efforts of courts of equity to prevent the harsh and unjust discriminations which the law formerly made between creditors of persons deceased, whose claims were in equity and justice equal; and it seems that the doctrine, as a general one, cannot be sustained upon any principle. For example, in the case just supposed, the doctrine of marshalling assumes that, in equity and justice, house B ought to exonerate house A from the first mortgage, whereas, in truth, they ought to bear the burden of the first mortgage equally. As between secured and unsecured creditors, equity clearly ought to favor the latter class, if either.

Lastly, still another instance of an equitable obligation created by equity alone, is the equitable hypothecation or lien given to a vendor, upon land which he has sold and conveyed, to secure the payment of the purchase-money.

Reference has been already made to cases in which a contract results in an equitable as well as a legal obligation. Why is this? Because the legal obligation is not sufficient for all the purposes of justice. In what contracts, then, do the purposes of justice require an equitable as well as a legal obligation? Chiefly in those which consist in giving (*dando*) instead of doing (*faciendo*). What are the defects in the legal obligation annexed to such contracts? Chiefly these: First, although an obligation to give a thing is said to confer on the obligee a right to the thing, a *jus ad rem*, yet this right can be enforced only against the obligor personally. A consequence of this is, that, if the obligor become insolvent after receiving the price of the thing, but before the thing

is actually given to the obligee, both the thing itself and its price will go to the creditors of the insolvent. Of course justice requires that, the obligor having obtained the price of the thing, the obligee should obtain the thing itself; and this an equitable obligation enables him to do. Secondly, a legal obligation can never be enforced against any person other than the obligor or his personal representative. If, therefore, the owner of a *res* who has incurred a legal obligation to give it to A, choose to give it to B, or if he die, and the *res*, being land, descends to his heir, it will be impossible for A to obtain any relief except damages, however inadequate such relief may be. But if an equitable obligation has also been incurred, it will be possible for A to obtain the *res* itself, notwithstanding the death of the obligor, and also notwithstanding the transfer of the *res* to B, unless the latter be a purchaser for value and without notice. Thirdly, a legal obligation creates a right (*i.e.*, a relative right) in the obligee alone, and this right must remain in the obligee until his death, unless it be previously assigned either by his own act or by act of law; and upon the death of the obligee, the right must vest in his personal representative. When, therefore, a contract is made with A to give a thing to B, it seems impossible to enforce the contract effectively by virtue of the legal obligation annexed to it; for it can be enforced by A alone, and he can recover no more than nominal damages. Equity will, however, annex to such a contract an obligation directly to B; and hence the latter can obtain in equity without difficulty, the benefit intended to be secured to him by the contract. So, if a legal obligation be incurred to convey land to the obligee, and the latter die before the land is conveyed, the sole right to enforce the obligation will go to the personal representative of the obligee; and yet, clearly the heir ought to have the land, though the personal representative ought to pay for it; for such would have been the effect of the performance of the obligation but for the accident of the death of the obligee. To meet this difficulty, therefore, equity will create an equitable right in the obligee, which, upon the death of the latter, will go to his heir.

Having thus treated with sufficient fulness of equitable rights, it remains to speak briefly of the violation of such rights. In respect to their violation, equitable obligations are subject to nearly the same observations as legal obligations. Equitable obligations are, however, more subject to violation by tortious

acts than are legal obligations; for, as an equitable obligation always has some legal or equitable right for its subject, any tortious injury to, or destruction of, this latter right, or any wrongful transfer of it, will, it seems, be a tort to the equitable obligee. Thus, a trespass committed upon land or upon a chattel which is the subject of an equitable obligation, is, it seems, a tort to the equitable obligee, though, as it is also a tort to the legal owner, and as the equitable obligee can, as a rule, obtain redress only through the legal owner, the tort to the equitable obligee seldom attracts attention. So it seems that any wrongful extinguishment by the obligee of an obligation which is itself the subject of an equitable obligation, though it is a breach of the equitable obligation, is also a tort to the equitable obligee. So it seems that the alienation by its owner of any right which is the subject of an equitable obligation, in disregard of such obligation, is a tort to the equitable obligee.

This completes what it was proposed to say upon the subject of rights and their violation, and the way is thus prepared to treat of remedies.

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[*To be continued.*]